IN THE

United States Circuit Court of Appeals

For the Ninth Circuit

CONSOLIDATED MUTUAL OIL COMPANY and J. M. McLEOD, Appellants, vs. UNITED STATES OF AMERICA, Appellee.	No. 2787
CONSOLIDATED MUTUAL OIL COMPANY and J. M. McLEOD, Appellants, vs. UNITED STATES OF AMERICA, Appellee.	No. 2788

BRIEF AND ARGUMENT FOR APPELLEE

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BRIEF AND ARGUMENT FOR APPELLEE

There are a number of persons and corporations joined with these appellants as defendants below, who have not joined in these appeals, and inasmuch as the parties to the appeals are the same, and the facts and law involved in both cases are practically identical, the appeals will be jointly considered in this brief.

Statement of Cases

The appellants, defendants below, were in possession of and claiming a right to the NE¼, S½ NW¼, N½ SW¼ and SE¼ Section 28, Township 31 South, Range 23 East M. D. M., under certain pretended placer mining locations, and at the time the suits were brought had drilled a large number of oil wells on the NE¼ and NW¼ involved in these cases, from which they had extracted and were extracting and converting to their own use large quantities of oil and gas.

The appellee, plaintiff below, claiming ownership and right of possession of said lands and all minerals therein, instituted and is now prosecuting these actions in equity in District Court of the United States for the Southern District of California for the purposes of removing the cloud cast upon its title by the claims of the appellants; to recover both the possession of the land and the value of the oil extracted therefrom; to enforce its general governmental policy with respect to the conservation, use and disposal of its public oil-bearing lands, and the oil therein; to prevent waste by the appellants and others on said lands; for an accounting for and the recovery of the value of the oil taken and converted by the appellants; for *injunctions restraining appellants from further trespassing and removing oil, and for the appointment of a receiver* in each of said causes to take charge of the property involved.

Applications for Injunction and Receiver—After the filing of the bills of complaint (Tr. p. 4) and the issuance and service of subpoenas *ad respondendum* the appellee served notices under which applications for the issuance of orders restraining the defendants from trespassing upon the lands and for the appointment of a receiver were made and granted pending the final disposition of the cases.

Statement of Facts

The verified bills of complaint (Trs. p. 4) were offered in evidence by the appellee in support of its applications for an injunction and the appointment of a receiver in each of the cases, and tended to prove the following facts: That the appellee was, on and after the date of the withdrawal hereinafter mentioned, the owner of and entitled to the possession of all the lands involved in each of the causes, and of all minerals therein; that on September 27, 1909, all of said lands were duly and regularly withdrawn and reserved by the President from all forms of entry, acquisition or appropriation under the mineral land laws of the United States, and were not after that date subject to exploration for minerals, or to occupation, or the institution of any rights; that notwithstanding these facts the appellants, in violation of law and of said withdrawal order, and the rights of the appellee, and to its great and irreparable damage, and to the great and irreparable injury to said lands, and by interference with the execution of its public policy

with respect to said lands, went thereon long subsequent to the date of said withdrawal, and wrongfully took possession thereof without having discovered oil, gas or other minerals, and thereafter without having any right so to do, drilled a large number of oil and gas wells thereon, produced and disposed of large quantities of oil and gas, and were at the time of filing said bills of complaint continuing so to do; that none of said appellants, nor any person under whom they claim, was at the date of said withdrawal a bona fide occupant or claimant of said land and in the diligent prosecution of work leading to the discovery of oil or gas thereon; that each of said appellants claims some right or interest in the land and in the oil and gas extracted under and through certain pretended notices of locations of mining claims, and by and through certain conveyances or contracts directly or mediately from pretended locators of such pretended locations under which no discoveries had been made, and that the said pretended location notices under which appellants claim were not made for the use and benefit of said locators but for the sole use and benefit of the appellant J. M. McLeod, under and through whom the appellant Consolidated Mutual Oil Company now claims.

In further support of, and in opposition to the applications, affidavits and documents (Tr. 2787, pp. 63 to 142, and Tr. 2788, pp. 56 to 135) were offered in evidence.

The evidence offered tends to establish the following facts:

Appellant McLeod claims title to *all the lands in said Section 28* through conveyances from persons who pretended to have made placer mining locations therefor on January 1, 1909, under which a final certificate embracing the NW¼, NE¼ and SE¼ of said section was issued to him as such transferee on October 31, 1914, under his application for a patent to said lands, but no patent has issued thereunder;

On June 25, 1909, McLeod in writing leased to one James W. Mays for the use and benefit of the Mays Oil Company, under whom appellant Consolidated Mutual Oil Co. now claims the NE¼, the S½ NW¼, the N½ SW¼ and the SE¼ of said section.

This lease provided that the lessee would, on or before July 15, 1909, erect a suitable derrick for drilling oil wells on each of said tracts, install a complete standard drilling outfit including a rig and tools on one of the tracts, and begin actual drilling thereon on or before August 12, 1909, and thereafter diligently continue drilling "until oil is struck in quantities deemed paying quantities by the second party (Mays) or further drilling becomes useless or unprofitable in the judgment of the second party." It was further stipulated that actual drilling should be begun on the other three tracts within thirty days after oil was discovered in paying quan-

tities on the tract first drilled. The Mays Oil Company, for whose benefit the lease to Mays was made, and under whom appellant Consolidated Mutual Oil Company now claims, at some time after June 25, 1909, and before September 27, 1909, erected and completed a skeleton derrick on each of the leased tracts, a bunk house on the S½ NW¼, a bunk house, a cook house and a water tank on the NE¼ and a stable for horses on the SE¼. A water pipeline was laid, and the derrick on the N½ SW¼ was fully equipped and drilling for oil was begun before September 27, 1909, and thereafter continued, with incidental intermissions, until oil was discovered on that tract. The buildings mentioned above were, on September 27, 1909, and thereafter, occupied by the employees engaged in drilling on the SW¼, but no work leading to the discovery of oil or gas was being done on either the NW¼ or the NE¼, involved in this appeal, on September 27, 1909, or at any time thereafter until the spring and summer of 1911; and oil was not discovered on either of these tracts until the summer of 1912.

The appellants claim that a lack of available water prevented the Mays Oil Company from drilling oil wells on the NW and NE quarters during the years 1909 and 1910.

Order Granting Application for Appointment of Receiver

Upon the facts disclosed by the evidence the Court below made its orders granting the applications for the appointment of receivers (Tr. 2787, pp. 51 and 55, Tr. 2788, pp. 44 and 49) and assigned as a reason therefor, that "In my judgment the present status of the property in these cases should be maintained, either by enjoining the withdrawal of oil, or by the appointment of a receiver, until the right of the defendants to withdraw oil from the land is finally determined either by the land department or by the Court. It seems to me that the appointment of a receiver will work less hardship to the defendants than the granting of an injunction." By the interlocutory decree (Tr. 2787, p. 56, Tr. 2788, p. 50) a receiver was appointed in each case, and defendants below were enjoined from removing oil and gas or other property from the land, pending final hearings, except by permission and under the direction of the said receiver.

From these orders these appeals have been taken.

Assignment of Error Insufficient

The first assignment of error is too indefinite and general to entitle it to consideration, in that it states that the Court "erred in appointing a receiver upon the pleadings, evidence and proofs before the Court."

Rule 11 of the Rules of this Court (C. A. A., 9th Ct.) requires the appellant to file with his petition for appeal

> "an assignment of errors, which shall set out separately and particularly each error asserted and intended to be urged. * * * When this is not done counsel will not be heard, except at the request of the court; and errors not assigned according to this rule will be disregarded, but the court, at its option, may notice a plain error not assigned."

In *Doe* vs. *Waterloo Mining Co.,* 70 Fed. 455, 461 (C. C. A., 9th Ct.), this Court held insufficient, as being too general, a specification of error which read as follows:

> "There is error in said decree, in this: that said court, upon the whole evidence, should have rendered a decree in favor of the complainant."

In that case the Court said:

> "There are nine assignments of error in the transcript. In the brief seven additional assignments of error are made. Appellee maintains that the court not consider these additional assignments; that rule 11 of this court precludes the court from considering them, except on its own motion. The contention of the appellant is that the additional assignments are only specifications under the first assignment of error. (Quoted above.) Rule 11 of this court requires that the assignments of error shall be separately and particularly set out. *The object of setting forth assignments of error is to apprise the opposite counsel and the court of the particular legal points relied upon for*

> *reversal of the trial court.* The attempt to make the assignments of error more particular in the brief is not proper. It is in fact an attempt to amend the record in this particular without permission of court." (Italics supplied.)

The Court then quoted the specification repeated above and said:

> "This is too general. There is no specification showing wherein the decree is not supported by the evidence."

See also

Andrews et al. vs. *National F. & P. W. Co.,* 76 Fed. 166;
McFarlane vs. *Golling,* 76 Fed. 23;
Mitchell T. Co. vs. *Green et al.,* 120 Fed. 49;
Mayor of Baltimore vs. *State of Maryland,* 166 Fed. 641.

Discretionary Power of Trial Court

Before considering the questions presented by the appellants' second, third, fourth and fifth assignments of error, it will be profitable to consider the principles which control the exercise of a trial court's power to issue injunctions and appoint receivers; and *the extent to which the exercise of that power will be controlled by appellate courts.*

It is a well established doctrine that the question as to whether injunctions will be issued or receivers will be appointed, *pending litigation,* as in these cases, is one which rests wholly within the sound

judicial discretion of trial courts sitting as courts of equity, under the peculiar circumstances of each particular case:

> "The appointment of a receiver *pendente lite,* like the granting of an interlocutory injunction, is to a considerable extent a matter resting in the discretion of the court to which the application is made, to be governed by a consideration of the entire circumstances of the case."
>
> High on Receivers (3d Ed.) Pr. 7.

See also

Beach on Receivers (2d Ed.) Pr. 7;
Smith on Receivers, Pr. 5(a).

Mr. Justice Brewer, in speaking for the Supreme Court in *Bosworth* vs. *Terminal etc.,* 174 U. S. 182, 186; 43 L. Ed. 941, 943, said:

> "But the appointment of a receiver is a matter resting largely in the discretion of the court—not, of course, an arbitrary but a legal discretion—* * *"

See also

City of Kankakee vs. *American Water Supply Co.,* 199 Fed. 757, 760;
South & North Alabama etc. vs. *R. R. Commission,* 210 Fed. 465, 482;
Milwaukee & M. R. R. Co. vs. *Soutter,* 2 Wall 510, 17 L. Ed. 900, 904;
Verplanck vs. *Caines,* 1 Johns (N. Y.) Ch. 57;
Lattimer vs. *Lord,* 4 E. D. Smith (N. Y.) 183;
Chicago etc. Co. vs. *United States Co.,* 57 Pa. 83;
Hanna vs. *Hanna,* 89 N. C. 68.

Review by Appellate Courts

While the statute authorizes appeals to the Circuit Court of Appeals from actions of the District Court in granting injunctions and appointing receivers (Jud. Code, Pr. 129, 36 Stat. at L. 1087), it is a well recognized fact that appellate courts in such cases, as in other cases where the action complained of resulted from the exercise of a discretionary power, presumes, in the absence of a clear showing to the contrary, that the trial court exercised its discretion without abuse, and will not ordinarily reverse and set aside the action appealed from, until the appellant, who is burdened with that duty, has made it clearly appear that the action complained of was improvidently taken upon a wholly erroneous comprehension of the facts or the law of the case, and has shown clear proof of an abuse of its discretion.

The law has vested that discretion in the trial court alone, and not in the appellate courts; and it is not, therefore, for the appellate court to say whether under the facts disclosed it would have taken the action complained of, but rather to determine whether there has been such a clear abuse of the lower court's discretion as will warrant the setting aside of its act, and this will not be done where the facts are in dispute, the evidence is conflicting, the questions of law involved are doubtful, or the issues are important, or where the property in dispute is likely to be irreparably injured if left in the possession of the appellant.

"The Circuit Court of Appeals may, but rarely will review the exercise of its discretion by the Circuit Court upon the granting or continuance of an injunction or the appointment of a receiver; but if there is no equity in the bill it will dissolve the injunction or the receivership, as the case may be, even it has been held when the point is not suggested in the assignment of errors nor raised in the court below." Foster Fed. Prac. (5th Ed.) Vol. 1, p. 935.

. . . . . .

"The merits will not generally be investigated, and the order of the court below will be affirmed unless an abuse of legal discretion is shown; or violation of the rules of equity controlling the exercise of the court's discretion."

Rose's Code of Federal Procedure, p. 293.

In *Texas Traction Co.* vs. *Barron G. Collier,* 195 Fed. 65, 66, Judge Shelby in speaking for the Circuit Court of Appeals (5th Ct.), said:

"This is an appeal from an order granting an injunction *pendente lite.* Formerly, the granting of such order was in the absolute discretion of the primary court; no appeal being allowed. The Act of March 3, 1891, allows an appeal from such decree. 26 Stat. 826. Since this act was passed, its uniform construction has been that the granting of an injunction pending the suit is in the sound discretion of the trial court, and that its order will not be disturbed on appeal unless it is violative of the rules of equity, or unless there has been an abuse of discretion, or unless the injunction has been improvidently allowed. The appellate court is not to decide as to what it would have done as to allowing the injunction, but it must

recognize that the law has imposed on the primary court the responsibility of the exercise of this power, and unless there has been a plain disregard of the law or of some settled rule of equity which should govern the issuance of injunctions so that it appears clearly that the injunction is issued improvidently, the decree should not be reversed. *Kerr* vs. *City of New Orleans,* 126 Fed. 920, 924, 61 C. C. A. 450; *Lehman* vs. *Graham,* 135 Fed. 39, 67 C. C. A. 513; *Massie* vs. *Buck,* 128 Fed. 27, 62 C. C. A. 535; *Clark* vs. *McGhee,* 87 Fed. 789, 31 C. C. A. 321; *Love* vs. *Atchison, T. & S. F. Ry. Co.,* 185 Fed. 321, 107 C. C. A. 403."

This announcement followed the doctrine laid down by the Circuit Court of Appeals for the Third Circuit in the case of *Northern Securities Co.* vs. *Harriman et al.,* 134 Fed. 331, 340, as follows:

"Upon appeal from an order granting a preliminary injunction, a reviewing court is not called upon, ordinarily, to enter into and decide the merits of the case, and unless the court below, in granting the preliminary injunction, has violated some rule of equity or abused its discretion, or acted improvidently, this court should not interfere with its discharge of the responsibility and duty imposed upon it. 'The right to exercise this discretion has been vested in the trial courts. It has not been granted to the appellate courts, and the question for them to determine is, not how they would have exercised this discretion, but whether or not the courts below have exercised it so carelessly or unreasonably that they have passed beyond the wide latitude permitted them, and violated the rules of law which should have guided their action'."

It is not through the exercise of a discretionary power residing with the appellate court that it can reverse the action of the lower court in granting an injunction or appointing a receiver.

> "The granting or withholding of an interlocutory injunction rests in the sound judicial discretion of the court of original jurisdiction, and, where that court has not departed from the equitable rules and principles established for its guidance, its orders in this regard may not be reversed by the appellate court without clear proof that it has abused its discretion. An appeal from such an order does not invoke the judicial discretion of the appellate court. The question is not whether or not the appellate court would have made or would make the order. It is to the discretion of the trial court, not to that of the appellate court, that the law has intrusted the granting or refusing of such an injunction, and the question here is: Does the proof clearly establish an abuse of that discretion by the court below? *Massie* vs. *Buck,* 128 Fed. 27, 31, 62 C. C. A. 535, 539; *Love* vs. *Atchison, T. & S. F. Ry. Co.,* 185 Fed. 321, 330, 107, C. C. A. 403; High on Injunctions (4th Ed.) Sec. 1696; *Higginson* vs. *Chicago, B. & Q. R. R. Co.,* 102 Fed. 197, 199, 42 C. C. A. 254, 256; *Interurban Ry. & Terminal Co.* vs. *Westinghouse E. & Mfg. Co.,* 186 Fed. 166, 170, 108 C. C. A. 298, 302; *Kerr* vs. *City of New Orleans,* 61 C. C. A. 450, 454, 126 Fed. 920, 924; *Thompson* vs. *Nelson,* 18 C. C. A. 137, 138, 71 Fed. 339, 340; *Societe' Anonyme Du Filtre Chamberland Sys. Pasteur* vs. *Allen,* 33 C. C. A. 282, 285, 90 Fed. 815, 818; *Murray* vs. *Bender,* 48 C. C. A. 555, 559, 109 Fed. 585, 589; *U. S. Gramophone Co.* vs. *Seaman,* 51 C. C. A. 419, 423, 113 Fed. 745, 749."
>
> *Fireball Gas Tank & I. Co.* vs. *Commercial Acetylene Co.,* 198 Fed. 650, 653.

See also

City of Kankakee vs. *American Water Supply Co.,* 199 Fed. 757, 760.

The trial court must have acted upon a wholly wrong comprehension of the facts or the law of the case, before its order will be set aside on appeal.

Louisville & N. R. Co. vs. *Western Union Tel. Co.,* 207 Fed. 1, 4;

Interurban Ry. & T. Co. vs. *Westinghouse Elec. & Mfg. Co.,* 186 Fed. 166, 170;

City of Shelbyville vs. *Glover,* 184 Fed. 234, 238.

The appellate court will not disturb an injunction which prevents irreparable injury to the complainant, and cannot seriously injure the defendant unless it is *entirely* clear from the record that there is no equity in the bill.

Coram vs. *Ingersoll,* 133 Fed. C. C. A. 1st Ct. 226.

Appellate court will not, in cases such as these, ordinarily review disputed questions of fact, and will not undertake to enter upon or determine the merits.

"Upon an appeal from an order granting or continuing an injunction the Circuit Court of Appeals will ordinarily not review disputed questions of fact arising from contradicting

affidavits when there has been no cross-examination, especially before issue injoined." Foster Federal Practice (5th Ed.), p. 934.

See also

R. R. Commission vs. *Rosenbaum Grain Co.,* 130 Fed. 110;

James vs. *Wild Goose M. & T. Co.* (C. C. A., 9th Ct.), 143 Fed. 868.

In the case of *McCarthy et al.* vs. *Bunker Hill S. M. & C. Co.,* 164 Fed. (C. C. A., 9th Ct.), 927, 940, this Court, in sustaining an injunction, said:

"Each case must be considered and made to depend upon its own particular fact and circumstances, in the consideration and determination of which the general rules governing courts of equity are to be borne in mind and applied. Among those rules is the well-established one that an appellate court will not ordinarily interfere with the action of the trial court in either granting or witholding an injunction in cases in which the evidence is substantially conflicting, and especially where the trial judge, at the request of the respective parties, has had the benefit of a personal inspection of the premises."

See also

King Lumber Co. vs. *Benton,* 186 Fed. 458.

Dimmick vs. *Shaw,* 94 Fed. 266, 268.

Burden on Appellants to Show Abuse of Discretion—In the recently issued Corpus Juris (Vol. 4, p. 789) a large number of cases are cited to support the statement that

> "Since it will be presumed, on appeal, in the absence of a showing to the contrary, that the discretionary powers of the lower court have been exercised without abuse, the burden of showing abuse is on the party complaining."

One of the cases thus cited, and which amply sustains the text, is *Heinze* vs. *Boston & M. C. etc.,* 20 Mont. 528, 52 Pac. 273, involving an appeal from an order granting an injunction.

Rules as to Issuing Injunctions Are Applicable to Appointment of Receivers

It may possibly be contended that inasmuch as the authorities cited above involve cases in which injunctions alone were considered, and in which receiverships were not involved, they do not sustain the contention here made that the doctrines they announce and follow apply to appeals from orders appointing receivers.

The right of appeal from orders of each of these classes is given by the same statute (36 Stat. 1087), and the appointment of a receiver, as well as the issuance of an injunction rests in the sound discretion of the trial court. The two remedies are coupled and the doctrines as to the court's dis-

cretion in relation thereto are simultaneously announced and considered by the leading text writers.

High on Receivers (3d Ed.) pr. 7;

Beach on Receivers (2d Ed.) pr. 7;

Smith on Receivers, pr. 5(a);

Bosworth vs. *Terminal etc.,* 174 U. S. 182, 186, 43 L. Ed. 941, 943.

Facts Supporting an Injunction Will Justify a Receivership—It is admitted that, as a general rule, facts which will ordinarily be sufficient to justify an injunction may not be such as will support the appointment of a receiver, but it is appellee's position that under the peculiar circumstances of these cases any facts which would justify an injunction will justify a receivership.

It is true that the courts are slow to appoint receivers in cases involving the possession only of real estate where the estate is not being consumed or irremediably damaged by the use; but these general rules do not apply in cases involving mineral lands, or in other classes of cases where the *corpus* is being taken or destroyed pending final action.

The courts depart from the general rule and resort to receiverships instead of injunctions where the former is a less harsh and injurious means of protecting the property pending litigation than the latter would be. The same rule has been applied in cases involving properties which constitute public

utilities, such as railways, and possibly water, gas or electric plants—"going concerns"—where serious injuries to the general public might result if the properties were forced into inactivity through injunctive orders, and again in cases where a cessation of operation by an injunction would contravene a public policy, or result in an irreparable injury to the property itself.

Both public policy and the protection of the property against waste suggested the course taken by the District Court, and the issuance of the form of the order appealed from in these cases.

The preservation of the property from injury resulting from cessation of operation will warrant a receivership instead of an injunction. This doctrine is referred to in High on Receivers (3d Ed.) pr. 615, as follows:

> "The aid of a receiver is sometimes granted in cases of mines or collieries pending a litigation which is to determine the title and rights of the parties, when, from the peculiar nature of the property, it is necessary that it should be kept in operation and preserved *pendente lite*.

In *Gibbs* vs. *David,* Law Rep. 20 Eq. Cas. 373, 376, the Court sustained a receivership on the ground that

> "the property is a colliery, and a going colliery, and both sides admit that it must be kept going or the lease will be forfeited; and, moreover, if it is not kept going, to be drowned out; and,

> therefore, it is absolutely necessary that it should be worked."

In *Elk Fork Oil & Gas Co.* vs. *Foster et al.,* 99 Fed. 485, 498 (C. C. A., 4th Ct.), each party asked for an injunction to prevent the other from taking possession of certain oil and gas land, and the lower court, finding that there was danger that irreparable injury would result from a cessation of work, of its own motion appointed a receiver to operate the wells. An appeal was taken from that action by one of the parties, and on appeal the Court said:

> "As it was deemed necessary that the property must be operated, the only question was who should operate it. Each side craved permission to do so. The court would not consent to give either party this authority, and preferred to select its own agent,—to name its own receiver. The appointment of a receiver was the necessary corollary to the case presented. 'Working of mines is something more than the common and ordinary use of real estate, and requires the use of more than ordinary remedies to protect the rights of a party entitled to the possession. The granting of an injunction, and, if necessary, the appointment of a receiver, are common remedies.' 15 Am. & Eng. Enc. Law, p. 605."

In *Mead* vs. *Burk,* 60 N. E. 338, 339, the Supreme Court of Indiana said:

> "As a general rule where the property in dispute appears to be exposed to danger and loss, and the person in possession or control thereof has not a clear legal title or right there-

to, the court, on the application of a person interested therein, will interpose and appoint a receiver for the security or preservation of the property pending the litigation. High Rec. (3d Ed.), Sec. 11; Smith, Rec., Sec. 5."

In *Nevada Sierra Oil Co.* vs. *Home Oil Co.,* 98 Fed. 673, before the Circuit Court for the Southern District of California, Judge Ross said:

"The subject of controversy in this suit is a piece of public land of the United States, containing under its surface petroleum, and to which both the complainant and the defendant claim to be entitled under and by virtue of the mining laws. As the defendants are extracting large quantities of oil from the ground, and prevent the complainant from doing the work thereon required by the laws of the United States in order to make good its alleged claim, an application has been made by it to the court for the appointment of a receiver to take possession of the property, and operate it, and do the required work, pending the litigation, for the benefit of the party that may ultimately be adjudged to be entitled to it; the respective parties agreeing that by reason of the operation of wells on adjoining lands no injunction ought, in any event, to be issued, because such action would necessarily result in the draining of a large part of the oil from the land in controversy by those operating the adjoining territory. Upon the hearing of the application a large amount of testimony was introduced on behalf of the respective parties, consisting in great part of conflicting affidavits. In respect to this conflict of evidence the court would not undertake, at this stage of the case, to make a decisive determination; but if the proof, taken as a whole, shows reasonable ground for the complainant's claim to the land in question,

> then, clearly, it will be the duty of the court to appoint a receiver to take possession of it pending the litigation, to the end that the annual work required by the laws of the United States may be performed for the benefit of the party who may ultimately prevail in the suit, and in order to conserve the property for the benefit of the party entitled thereto, and prevent the extraction and disposition, pending the litigation, of the oil, which the proof shows constitutes the chief, if not the only, value of the land."

When Receiverships Are Less Harsh—It appears, therefore, that the Courts readily appoint receivers in cases where the best interests of all parties require it, rather than an injunction which would prevent the operation of the property when necessary to protect it from damage. In the cases now under consideration, Judge Dooling, for that reason, appointed a receiver with certain proper discretionary powers, instead of issuing injunctions which would have entirely prevented further operation of the wells in any event.

In cases such as these the Courts have said that even a showing of the insolvency of the persons in possession is not necessary to the appointment of receivers.

In *Waskey* vs. *McNaught et al.* (C. C. A., 9th Ct.), 163 Fed. 929, 937, this Court said:

> "The absence of an allegation in the affidavits filed in support of the motion for injunction charging the defendants were insolvent is im-

material. The alleged injury is irreparable in itself."

See also

34 Cyc., 57, 58;

1 Beach, Sec. 35, 40;

Thomas vs. *Nantahala & Talc Co.,* 58 Fed. 485, 488;

Nutter vs. *Brown,* 1 L. R. A. (N. S.) 1085, 1090;

Mead vs. *Burk,* 60 N. E. (Ind.) 338, 340.

Inasmuch as both the granting of injunctions and the appointment of receivers rest within the discretion of the trial courts, and in view of the fact that receiverships may be resorted to instead of injunctions, in cases like those now under consideration, it seems incontrovertible that the consideration of appeals from the appointments of receivers must be controlled by the well-established rules under which consideration is given to appeals from the issuance of injunctions.

It will be assumed, therefore, that this Court will affirm the order appealed from unless it clearly determines from the record and matters, as presented by these appeals, that the orders complained of were improvidently made upon a wholly erroneous comprehension of the facts or the law of the case, and that it will not from the conflicting testimony of record undertake to say whether it would have, in the first instance, taken different actions.

There Is at Least a Probability That Appellee Will Recover

Second Assignment of Error—We find in the second assignment a contention that a receiver should not have been appointed because it has not been shown that

The appellee probably has the right to, and will probably recover the lands involved and the possession thereof in these suits.

As has been indicated by some of the authorities already cited above, and as is abundantly established by other authorities, it is the well-established rule that in actions such as these courts are not called upon to, and will not at this juncture fully determine questions of title or right of possession, and will not go fully into the merits of the case.

Mr. High, in his work on Receivers, lays down the general rule (pp. 8, 9, 3d Ed.) when he says:

> "And if the plaintiff presents a *prima facie* case, showing an apparent right or title to the thing in controversy, and that there is imminent danger of loss without the intervention of the court, the relief may be granted without going further into the merits upon the preliminary application. Indeed, upon an interlocutory application for a receiver, a court of equity usually confines itself strictly to the point which it is called upon to decide, and will not go into the merits of the case at large, since the court is bound to express its opinion only to the extent necessary to show the grounds upon which it disposes of the application."

See also

Waskey vs. *McNaught et al.* (C. C. A., 9th Ct.), 163 Fed. 929, 937.

In *Buskirk* vs. *King,* 72 Fed. 22, the plaintiff, claiming under a grant from the State of West Virginia, brought ejectment against defendant, who answered that the grant under which plaintiff claimed had been forfeited, and set up title in himself through another source. The defendants appealed from an interlocutory decree by which an injunction was granted restraining them from cutting timber from the land *pendente lite,* and the Circuit Court of Appeals (4th Ct.), in affirming the decree said:

> "In such matters the plaintiff is not required to make out such a case as will entitle him to a decree in his favor on final hearing, and it sometimes happens that he ultimately fails to secure the relief asked for, while, nevertheless, the granting of the preliminary injunction is entirely proper. * * * And this is particularly so in cases where the value of the property in dispute consists of timber standing on the land, or in minerals in it."

In *Hunt* vs. *Stesse,* 75 Cal. 620, 624, the Supreme Court considered a case in some respects similar to *Buskirk* vs. *King, supra,* and there said:

> "In cases of this kind an injunction should be granted pending the determination of the issue as to ownership, unless it appear that the plaintiff's title is bad, or at least, that there is no reasonable ground for the assertion of title by

the plaintiff. The mere existence of a doubt as to the title does not of itself constitute a sufficient ground for refusing an injunction."

GOVERNMENT OWNERSHIP PRESUMED—It was not encumbent upon the appellee to produce evidence of its ownership originally of the lands in question, or of its right of possession, because the Courts know judicially, as an historical fact, that the title to them passed to the United States by the treaty of Guadeloupe Hidalgo, which became and is a part of the law of the land, and as such is already known to the courts.

United States vs. *Reyner,* 9th How. 127, 18 L. Ed. 74;

Lewis vs. *Harris,* 31 Ala. 689, 699.

The title having been once vested in appellee it, and all of its appurtenances must be presumed to remain there until the contrary is shown by competent evidence.

Gardner vs. *Green et al.,* 8 Ala. 86;

People vs. *Feilen,* 58 Cal. 218;

Kidder vs. *Stevens,* 60 Cal. 414, 419.

APPELLEE'S EVIDENCE SUSTAINS THE APPOINTMENT. —Aside from the foregoing consideration the appellee's application for the appointment of a receiver is amply sustained by the evidence offered.

The facts set up in the verified bills of complaint (Tr. 2787, p. 4 and Tr. 2788, p. 4) are sufficient

and were held by the trial court to be sufficient, if proved on the final hearing, to warrant not only injunctions and receiverships, but to fully support decrees granting all the relief sought by the appellee. A bill of complaint practically identical with the bills here involved was sustained by this Court on appeal in the case of *El Dora Oil Company et al.* vs. *United States,* 229 Fed. 946.

The bills of complaint were offered in evidence in support of the motions for injunction and receiver, and their probative effect is attacked by the appellants' fifth assignment of error on the ground that they were "not so verified that they could be used for that purpose, inasmuch as it appears that the affiant had no personal knowledge of the facts alleged."

This objection goes to the weight rather than to the admissibility of the evidence, and, even if the trial court's action was based solely on this evidence, independent of other evidence and considerations, that fact would not show such a clear abuse of its discretion as to warrant a reversal of its action. Authorities need not be mentioned to support the doctrine that an appellate court seldom, if ever, disturbs the action of the trial court when a contention that findings of fact by the trial court are against the weight of the evidence is the only question presented on appeal.

But the objection is, for other reasons, not well taken. While the affiant who verified these bills of

complaint specified the sources of his information, he stated that from these sources "he is informed as to the matters and things stated" in the bills of complaint, and he then swears, not upon "information and belief", but positively and unequivocally, that the matters and things stated in the bill as facts "are true." What were the "matters and things" stated in those bills which were essential to the appointment of receivers? They were the statements that the appellee owned and was entitled to the possession of the land, and that the appellants were wrongfully trespassing upon and extracting oil to the irreparable damage of the lands.

And what were the sources of information from which affiant obtained a knowledge of these facts? They were, as his affidavit says, his personal examination of the lands themselves, which showed him that the appellants were in possession of and taking oil from the land, and they were his personal examination of the records of the General Land Office, the local land offices, and the Court and County records which disclosed the status of the title to the lands. To what better sources could the affiant have gone than to these to obtain a knowledge of the facts he swears are true?

Appellants' Admissions Sustain the Court's Action—The appellants are here claiming as the grantees of the appellee, under mineral locations which were admittedly invalid at the date of the

withdrawal because no discovery of minerals had then been made on the lands they cover. They have also admitted that they went upon the lands and extracted oil therefrom, and they seek to sustain their claim to title, and to justify their trespass by attempting to show such facts as to their possession and diligence at that time and thereafter as would under the law validate their locations and give them a right to a patent. The defense is a confession and avoidance. They cannot, therefore, deny appellee's title if they have failed to show their own; and *they have, therefore, burdened themselves with the duty of showing that there is no probability that the appellee will eventually recover in these cases.*

The third assignment of error does no more than to raise a question as to

The Effect of the Withdrawal of September 27, 1909

The appellants contend that the lands involved, although described in the withdrawal order of September 27, 1909, were not affected by it because the pretended locations embracing them, coupled at that time, and thereafter, with actual possession and diligent prosecution of work leading to discovery of oil or gas, made them such "valid locations or claims" within the meaning and intent of the words of that order, as excepted the lands from withdrawal and left them subject to claimant's possessory rights

which ripened into perfected mining claims when oil was finally discovered.

The language of the withdrawal order is as follows:

> "In aid of proposed legislation affecting the use and disposition of the petroleum deposits on the public domain, all public lands in the accompanying lists are hereby temporarily withdrawn from all forms of location, settlement, selection, filing, entry or disposal under the mineral or non-mineral public-land laws."

This order contained at its end the following saving clause:

> "All locations or claims existing *and valid* on this date may proceed to entry in the usual manner after filing, investigation and examination."

Before the appellants' contention that these lands were not affected by that withdrawal order can be sustained, it must be concluded that it was intended in that order that placer mining locations under which no discovery of minerals had been made should be considered as "*valid* locations."

It will be observed that all lands described in the order of withdrawal were withdrawn "from all forms of location, settlement, selection, filing, entry or disposal" under both the mineral and *non-mineral* public land laws, and that the saving clause refers as well to "settlements", "selections", "filings", and "entries" of non-mineral lands as to

"locations" under the mineral laws. The saving clause of the order uses the words "valid locations or claims", and inasmuch as the word "locations" is generally used in connection with mineral lands, and not as specifying an interest in non-mineral lands, and in view of the fact that the words "settlement", "selections" and "filings" are never used in connection with mineral lands, it is reasonable to conclude that the word "claims" was used as relating to and protecting existing "settlements", "selections", "filings" or "entries" embracing non-mineral lands only.

This order refers to and protects the *acts* or *procedure* of appropriating lands, and not to the lands themselves when it mentions "locations", "selections", "filings" and "entries", and the words "locations" and "claims" as there used were not used as synonyms, or intended to be so construed. They are separated by the disjunctive "or", and were intended to be used in and given their ordinarily accepted significance.

> "'Location' and 'Mining Claim' Defined—'Location' and 'mining claim' may not always or necessarily mean the same thing. The Supreme Court of the United States has said that a mining claim is a parcel of land containing precious metal in its soil or rock.
>
> A location is the act of appropriating such parcel according to certain established rules. The 'locations' in time became among the miners synonymous with the 'mining claim' originally appropriated." Lindley on Mines (3d Ed.) 327.

The word "claims" is never used to indicate the procedure leading up to a patent to mineral lands.

If these suggestions justify the conclusion that interests in mineral lands are protected by the use of "locations" only, and not by the use of the word "claims" it must necessarily follow that the pretended locations in these cases did not except these lands from the segregating effect of the withdrawal order because the saving clause protects only "valid locations", and there can be no such thing as a valid location or valid claim prior to discovery.

McLemore vs. *Express Oil Co.,* 112 Pac. 59;

Mining Co. vs. *Tunnel Co.,* 196 U. S. 337;

Waskey vs. *Hammer,* 223 U. S. 85.

This conclusion cannot be overcome by the suggestion that a withdrawal order would not and could not affect mineral locations which were supported by an actual discovery, and that it was intended to protect locations such as these, in the absence of a discovery, when they were supported by actual possession and diligent prosecution of work leading to a discovery of mineral.

If appellants' contention is correct, then the saving clause in Section 2 of the Act of June 25, 1910 (36 Stat. 847), commonly known as the Pickett Act, was an unnecessary and useless piece of legislation. That Act protected "any person, who at the date of any order of withdrawal heretofore or

hereafter made, is a bona fide occupant or claimant of oil or gas-bearing lands, and who, at such date, is in diligent prosecution of work leading to discovery of oil or gas, * * * so long as such occupant or claimant shall continue in diligent prosecution of said work."

Congress must be said to have legislatively construed the saving clause of the withdrawal order as being insufficient to protect interests such as are protected by that Act, or it would not have done an idle thing by enacting the Act.

Again it is reasonable to assume that if the saving clause of the withdrawal order had been intended to give the relief extended by the Pickett Act, more specific language, wording similar to that used in that Act, would have been used in that order.

The Courts had announced that a mere paper location, in the absence of an actual discovery, conferred no rights upon the pretended locators, and especially so as against the United States. *Borgwardt* vs. *McKittrick Oil Co.,* 164 Cal. 650. It had, however, been held before the withdrawal order, that the occupancy and claim under such a location afforded protection against forcible or fraudulent intruders, to one who "in good faith makes his location, remains in possession, *and with diligence prosecutes his work toward discovery.*" *Miller* vs. *Chrisman,* 140 Cal. 440, 447; 73 Pac. 1085.

See also

Chrisman vs. *Miller,* 197 U. S. 313.

The language thus used was practically adopted in later decisions by the Courts (*McLemore* vs. *Express Oil Co.,* 158 Cal. 559), and by Congress in the Pickett Act, and it is reasonable to assume that if it was intended that similar protection as against the Government had been intended by the saving clause in the withdrawal order similar language would have been there used instead of "valid existing claims", and "valid locations."

To say that the saving clause of the withdrawal order is without effect if it means what it really says, "valid locations", is to charge not only the President but also the Congress of the United States with repeatedly doing a useless and ineffective act, because Congress has frequently used similar language for similar purposes, an instance of which is found in the Act of May 11, 1910 (36 Stat. 354), which created, withdrew land for, and fixed the boundaries of the Glacier National Park, and specifically provided:

> "That nothing herein contained shall affect any *valid existing claim, location,* or entry under the land laws of the United States or the rights of any such claimant, locator or entryman to the full use and enjoyment of his land."

But even if it be conceded that the saving clause in the withdrawal order was intended to and did

protect persons who were in actual possession under invalid locations or claims which were not valid at the date of the withdrawal, and who were then, and thereafter continued in the diligent prosecution of the necessary work, these appellants cannot here invoke that protection because, as will be hereinafter noticed, they were not then or for nearly two years thereafter prosecuting the necessary work *on these lands* with diligence or otherwise.

The Pickett Act Does Not Protect These Appellants

The fourth assignment of error presents only the following questions:

(1) Were the appellant McLeod and the Mays Oil Co. under whom appellant Consolidated Mutual Oil Company claims, at the date of the withdrawal order such "*bona fide* occupants or claimants" of the lands here involved as entitled appellants to claim the protection of the Pickett Act, and

(2) Were they on that date and thereafter in such "diligent prosecution of work leading to discovery of oil or gas" on the lands *here in dispute,* as will justify a patent, if it be found that they were *bona fide* occupants or claimants?

(1) McLeod and Mays Oil Company Were Not Bona Fide Occupants or Claimants—It is alleged as a fact in paragraph XI of each of the bills of complaint (Tr. p. 11) that the locations under which these appellants claim were not made for the

individual use and benefit of the persons by whom they pretend to have been made, but were made for the benefit of appellant McLeod or some other persons, and, in so far as this allegation was proved by the introduction of the bills of complaint in evidence, it has been established by the appellee at the hearings of the motions here involved; but it is denied under oath by appellant McLeod, and, although none of the pretended locators have been called to testify, it may be here considered as a disputed fact such as this Court, on an appeal of this kind, is not called upon to settle.

But it is earnestly contended that, aside from the question of bad faith involved in the making and recording of the locations, there is ample evidence to show that McLeod and the Mays Oil Company did not on the date of the withdrawal, or for a long time thereafter hold these lands in good faith as contemplated and required by Congress in the passage of the Pickett Act.

Facts Showing Mala Fides are found in the lease executed by appellant McLeod to James W. Mayes for the benefit of the Mays Oil Company, and offered in evidence by the appellants in each of the cases (Tr. 2787, pp. 95 to 101, and Tr. 2788, pp. 90 to 109). That lease stipulates that a derrick should be erected on each of the four tracts of land mentioned in it, of which the lands in dispute were two tracts, on or before July 15, 1909. It was evidently intended that these derricks, erected long

before they were needed for drilling purposes, were to be erected at an early date in defense of the pretended locations, as mere scare-crows, to warn prospective locators from the lands, and as mere "assessment work," which has no place in the law until after discovery.

That there was at the date of this lease an intent in the minds of both McLeod and the Mays Oil Company not to drill on any of the other three tracts, and an intent to keep others from doing so, until after oil had been discovered on the tract first drilled is fully shown by the fact that it was further stipulated in the lease that a complete standard drilling outfit, including rigs and tools, should be installed *at one of the four derricks,* and that drilling was to be continued there until oil was "struck" at that point in paying quantities, *or further drilling became unprofitable.*

If oil was not discovered on the tract first drilled the lessee was under no obligation to drill on either of the other three tracts; and that there was not at the date of the lease, or at any other time until about a year and a half after the date of the withdrawal, *any present intent to drill* more than one tract is fully shown by the fact that the lease contained a stipulation that drilling should begin on the other three tracts within thirty days after the lessee had concluded that oil had been discovered in paying quantities on the first tract. The lessee was under no obligations to the lessor to drill on more than one tract until he had discovered oil, and if he failed

to find oil in paying quantities on the first tract his contract brought him to the end of his obligations to McLeod.

McLeod and his lessee were, therefore, mere idlers with respect to these lands, seeking to prevent claims, occupancy or development thereon by others, and to monopolize and hold them for themselves until it should, in certain contingencies, seem to be for their benefit to begin work on them. The first well was not drilled on either of the tracts here in dispute.

The lack of available water for the drilling of more than one well at the same time, now plead by the appellants as an excuse for lack of diligence, was not then in the minds of McLeod and his lessee, and found no place in their lease as a justification for lessees' failure to drill more than one well if he had found oil in the first well.

That they did not intend to drill on three tracts until oil had been found on the fourth, finds confirmation in common experience, but no justification under the law for a claimant such as McLeod. This land was comparatively untested territory, and had not been found to contain oil. No other wells had been or were being drilled within less than one and one half miles of this land.

Under These Facts Were They "Bona Fide Occupants or Claimants" Within the Meaning of the Pickett Act?—It was evidently not the in-

tent of Congress to protect persons who were claiming large areas of land simply because they were at work on one claim. It has always been the Government's policy to distribute its bounty in public lands as widely as possible among its citizens, and to this end it has limited the area each mineral claimant may acquire under one location to twenty acres, or eight persons to one hundred and sixty acres. It cannot, therefore, be said that Congress intended that a liberal interpretation of the Pickett Act should give protection to the holder of a large number of claims when he was working on only one of them, and it certainly was not intended to extend a benefit to one who acquired a large number of claims in order that he might hold them all speculatively until he had found oil on one of them.

Who Are Bona Fide Claimants—These considerations lead to the conclusion that a "bona fide occupant or claimant" within the intent and purposes of the Pickett Act is *one who is in possession of and holding the land in good faith and with the honest purpose and present and unequivocal intent* to do the things (and who is so doing, diligently and continuously) thereon which are necessary to the acquisition of title under the mining laws.

In defining "*bona fide* pre-emption claimant," Mr. Justice Field, speaking for the Court in *Hosmer* vs. *Wallace,* 97 U. S. 575, 581; 24 L. Ed. 1130, 1132, said:

> "It was intended to designate one who had settled upon land subject to pre-emption, with

> the intention to acquire its title, and had complied, or was proceeding to comply, in good faith, with the requirements of the law to perfect his right to it."

In *Rutledge* vs. *Murphy,* 51 Cal. 388, 393, it was said:

> "The term *bona fide,* as applied to a pre-emption claimant in the proviso to the eighth section of the act, must be deemed to have some meaning, and was intended to designate one who, having the proper qualifications, in good faith settled upon a parcel of land which was subject to pre-emption, with the intention to pre-empt it, and who had performed, or at least was proceeding in good faith to perform, the necessary conditions."

Section 3, Act May 14, 1880 (21 Stat. 140) gives a preferred right of entry to one who settles on public land, but no such right is acquired by mere occupancy and cultivation when the occupant does not have a fixed intent to acquire title (*Northern Pacific Ry. Co.* vs. *McCormic,* 89 Fed. 659), or by one who makes settlement for the ulterior purpose of acquiring valuable timber, or for any purpose other than that of establishing a home.

> *Wright* vs. *Larson,* 7 Land Dec. 555;
> *Benson* vs. *State of Idaho,* 24 L. D. 272.

The degree of good faith, and its manifestation necessary to protect a location made before actual discovery, were considered by the Supreme Court of California before the passage of the Act of June 25, 1910, in the following cases:

In *Miller* vs. *Chrisman,* 140 Cal. 440, 447, it was said that:

> "One who thus in good faith makes his location, remains in possession, and with due diligence prosecutes his work to discovery, is fully protected against all forms of forcible, fraudulent, surreptitious, or clandestine entries and intrusions upon his possession."

In *McLemore* vs. *Express Oil Co.,* 158 Cal. 559, it is said that:

> "What the attempting locator has is the right to continue in possession, undisturbed by any form of hostile or clandestine entry while he is diligently prosecuting his work to discovery. This diligent prosecution of the work of discovery does not mean the doing of assessment work. It does not mean the pursuit of capital. It does not mean any attempted holding, by cabin, lumber pile or unused derrick. It means the diligent, continuous prosecution of work, with expenditure of whatever money may be necessary to the end in view."

If McLeod and the Mays Oil Company were not *bona fide* claimants the defense set up in these cases must fail.

Interpretation of the Pickett Act

But if it be determined that appellant McLeod and the Mays Oil Company were such *bona fide* occupants and claimants as were entitled to invoke the protection of the Pickett Act, it will then become necessary to ascertain whether they, at and after the date of and after the withdrawal, did the work necessary to that end.

It is not contended that they were doing any work on these particular tracts in dispute on September 27, 1909, the date of the withdrawal, or thereafter during the years 1909 and 1910, but it is claimed that the work they did on the N½ of the SW¼ of that section which adjoined one of these tracts and cornered with the other was "work leading to discovery of oil or gas" *on the tracts in dispute.*

This contention calls for a close scrutiny and an interpretation of the Pickett Act, and for that purpose we must look to the intent and purpose of the act as manifested by its language, by the relief it was intended to afford, and by the burdens and duties it imposed; and this must be done in the light of the conditions then existing, and the laws then in force, as well as from the words used in its enactment.

Purpose of the Pickett Act—It was a well and long established doctrine that a mineral claimant could not, prior to actual discovery on the tract claimed, gain any paramount right as against the Government, or any right which prevents the Government from withdrawing the land from disposal under the mineral land laws (Lindley on Mines, 216 and cases there cited); and it is equally well settled that when any qualified person is in possession of public lands with a *bona fide* intent to acquire title *under any public land law* which recognizes occupancy as being necessary to the acquisition of title, *and is diligently doing all the things necessary to*

such acquisition, his rights cannot be defeated by any other person who by force or fraud intrudes upon his possession. That this doctrine applies to claimants who have attempted to make premature locations under the mineral land laws, locations so made before actual discovery, is too well settled to call for citation of authorities; and the Pickett Act was evidently passed for the purpose of so extending the protection afforded by this doctrine as to prevent the inchoate rights of such claimants from being defeated by governmental withdrawals.

That Congress was asked to extend, and had in mind the extension to the Government of the doctrine that such rights could not be defeated by a wrongful intruder is evidenced by the following quotation from the published hearings before the House Committee on Public Lands when that Act was under consideration, of which this Court will take judicial notice. (May 13 and 17, 1910.)

Mr. Weil, who now appears as attorney for these appellants at that hearing, said:

> "The effect of that decision (of the Supreme Court of California) was this:
>
> "Mr. Chairman: Under the placer mining law the placer miner has no rights between the time of location and the time of discovery. But where a man has located a piece of placer mining ground—for oil, for instance—and it takes him two or three years to validate his location by making a discovery, the courts have held that during that period of time, so long as he is operating in good faith and attempting to make

> a discovery on the land, no one else can initiate a valid location against him by clandestine or surreptitious entry.
>
> "Mr. Robinson: What cases have held that?
>
> "Mr. Weil: One of them is the case of *Miller* vs. *Chrisman* (140 California).
>
> "Mr. Chairman: Was that between two mineral claimants?
>
> "Mr. Weil: Yes, sir; not as against the Government. The difficulty here is that we concede that we have no rights against the Government until we have made a discovery (Page 6)."

And that Congress was asked to, and intended to do no more than extend to and impose upon the Government the spirit of the rule the courts had invoked for the protection of such claimants against forcible and fraudulent intruders is apparent, not only from the language of the Act itself, but from the further statements made at the hearing before the committee above referred to.

Mr. Pickett, by whom the bill was introduced in Congress, said at that hearing:

> "I should like to ask this question of some of these gentlemen here who are authorized to speak for the California delegation (of oil claimants seeking relief) present. How much or how little (whichever way you want to put it) do you think a man should do upon one of these locations to come within the protection of the law?"

To this inquiry Mr. Ewing replied:

> "Let Mr. O'Donnell answer that. He is the most practical oil man present."

Mr. O'Donnell then answered, in part, as follows:

> "It is hard to determine just where the pursuit of discovery commences; but it has got to be legitimate and continuous. That is the line of all the decisions in all the cases we have had in California, when contests have been raised over these lands. * * * As a practical man, knowing nothing about law, I would say that if a provision is inserted in this bill following out the line of those decisions and the practice they have led to, I believe it will protect the interests of those that are expending money in an effort to make these discoveries, and that any pretense to that end will not acquire these lands."

That this suggestion was followed, and that a proviso was inserted in the bill "following out the line of those decisions" of the Court is plainly evident from the wording of the Act. It affords protection to "*bona fide* occupants or claimants" who were "*in the diligent prosecution of work leading to discovery,*" and the decision in *Miller* vs. *Chrisman,* to which the attention of the Committee had been specifically called by Mr. Weil, says that protection against intruders who resort to force or fraud shall be given to one who "*in good faith* makes his location, remains in possession, *and with due diligence prosecutes his work to discovery.*" (Italics supplied.)

The language used by Congress in this Act is so practically identical with that used by the Supreme Court of California in *Miller* vs. *Chrisman, supra,* and again repeated in *Borgwardt* vs. *McKittrick Oil*

Co., supra, and so similar to the language used by that Court in *McLemore* vs. *Express Oil Co., supra,* as to justify the assumption that Congress not only intended to extend the principle of the rule recognized in those cases but, practically, adopted the language of the Court in doing so.

But that Congress intended to do more than extend the rule announced by the Court, and that it extended protection only upon the same terms and conditions imposed by the Court must also be conceded. The Act, as did the rule, announced by the Court, required location notices to be posted and boundaries to be marked, an occupancy and claim, in good faith, and required the same diligence and continuity in the prosecution of work, and the same kind of work, and that the Act was not intended to enlarge the rule of the Court, or to give claimant larger rights against the United States than formerly existed against intruders, is shown by the fact that the Act itself expressly declares that it "shall not be construed as a recognition, abridgement or enlargement of any rights or claims," etc.

Inasmuch as the provisions of the Pickett Act are practically identical with the rule announced in the decisions referred to, and was enacted in the light of those decisions, we are with assurance justified in looking to those decisions for the correct interpretation of that Act, for the ascertainment of its requirements, because:

> "It is a familiar and fundamental rule for the interpretation of a legislative statute that

it is presumed to have been enacted in the light of such existing judicial decisions as have a direct bearing upon it,"

In re Moffit's Estate, 153 Cal. 359; 95 Pac. 653, 654), and

"A statute must be construed in the light of the unwritten law" (36 Cyc.), and

"Statutes are not to be understood as affecting any change in the law beyond what is expressed or is necessarily implied from the language used."

36 Cyc., 1145.

Work and Discovery Required—Turning to the decisions of the Court to ascertain the meaning and significance of the words "work" and "discovery" used in the Act, we find that the Supreme Court of California, in defining "work," in *McLemore* vs. *Express Oil Co., supra,* said:

"This diligent prosecution of work of discovery does not mean the doing of *assessment work.* It does not mean the pursuit of capital to prosecute the work. It does not mean any *attempted holding* by *cabin,* lumber pile or unused derrick. It means the diligent, continuous prosecution of work, with the expenditure of whatever money may be necessary *to the end in view.*"

This language was quoted with approval by Judge Bean in his decision, rendered May 1, 1916, in the case of *United States* vs. *Midway Northern Oil Company* and five other similar cases upon which final decrees were entered. 232 Fed. 619.

And in *Borgwardt* vs. *McKittrick, supra,* the Court said:

> "Clearly, the mere 'figuring' with other persons by the locator as to what they will charge for the doing of such work, or the making of an effort to find some one who will do such work at a price satisfactory to the attempting locator * * * cannot be construed as a diligent prosecution of the work of discovery."

See also:

Ophir Silver Mining Co. vs. *Carpenter,* 4 Nev. 438;

United States vs. *Midway Northern Oil Co. et al., supra.*

Smith vs. *Union Oil Co.* (Cal.), 135 Pac. 966;

United States vs. *McCutchen et al.* (unpublished), (So. Dist. California).

Work Must Be Such as Gives Notice—In determining the object and character of the "work" required by the Pickett Act, it will be helpful to keep in mind the mandatory demands for notice which the law makes upon all persons who seek title to public lands.

The law provides two methods by which claims to public lands may be first initiated, which are (1) by taking possession of a particular tract and doing such acts thereon as will *furnish notice to all subsequent comers* of the claimant's possession and intent to acquire title, such as making "settlement" under the homestead, townsite and pre-emption laws (Secs.

2263, 2264, 2387, R. S. U. S., and Sec. 3, Act May 14, 1880, 21 Stat. 140), "opening and improving a coal mine" (Secs. 2348 and 2349 R. S. U. S.), and making "location" (after discovery) on mineral lands (Sec. 2322 R. S. U. S.); and (2) by the presentation of written applications to enter at the United States Land Office for the district in which the lands desired are located.

In order that the public shall have knowledge of existing rights, and to avoid conflicting and adverse claims, the giving of *ample notice* of the initiation of a claim is among the mandatory requirements of the public land laws.

Homestead and pre-emption claimants are not only required to maintain substantially continuous possession, evidenced by improvements, but they, as well as coal land claimants, are compelled to protect their claims by placing their applications of record in the local land office within a limited time, so that they will disclose their claims. The law is even more exacting as to mineral claimants. It demands both the posting and recording of written notices; it requires possession to be maintained, and calls for the recording of "proofs of work" showing, after discovery, annually, work or improvements on each claim amounting to one hundred dollars; and no claimant can acquire title to public lands under any of these laws without both posting notices on the land and continuously publishing notices in the newspaper pub-

lished nearest the land for from thirty to sixty days before he applies for patent, and doing the necessary work. (Sec. 2325 R. S. and Act March 3, 1879, 20 Stat. 472.)

Work Must Be on the Particular Tracts—In the light of these general requirements, and in view of the emphasis which the law gives to its demand for notice, it can be safely said that the "work" contemplated by the Pickett Act, coupled with possession and diligence, must have been such work *upon the tract in question,* or so closely related thereto and accompanied with possession thereof as to plainly indicate to all persons coming upon the tract that it was then being claimed and worked under the mineral land laws.

This conclusion finds support in the decisions of both the Courts and the Land Department.

The Federal Circuit Court for Nevada, in speaking of the character and acts of possession which are necessary to prevent wrongful intrusion, said in *Garrard* vs. *Silver Peak Mines,* 82 Fed. 578, 591, that the law required "such acts to be performed as are necessary to subject the land to the will and control of the claimant, sufficient to *notify the public* that the *land is claimed* and occupied and is in the possession of claimant." (Italics supplied.)

Possession and "work" necessary to give a mineral claimant exclusive possession as against intruders are closely akin to the "settlement," and

acts thereunder which give paramount rights to a settler under the homestead and pre-emption laws, and

> "The rule is, that to constitute a settlement the settler must go on the tract claimed and do some act connecting himself with said tract, and the act must be equivalent to an announcement of intention to claim the land from which the public generally may have notice of the claim. (*Samuel M. Frank,* 2 L. D. 628; *Fuller* vs. *Gibbon,* 15 L. D. 231.) It must consist of some substantial and visible improvement, having the character of permanency, with intent to appropriate the land. (*Howard* vs. *Piper,* 3 L. D. 162, 163)."
>
> *Hunter* vs. *Blodgett,* 20 L. D. 452, 454.

If, as these decisions seem to abundantly show, the "work" required must be such as will give notice to the public of the fact that a particular tract is being claimed and worked under the mineral land laws, such work must be actually performed upon or obviously and closely related to that tract (the tract being in possession), and it necessarily follows that the drilling of a well on the southwest quarter would not give notice of the claim to the other quarters of the section, and the Courts have said that a cabin or unused derrick will not answer the demands of the law for such work.

Kind of "Discovery" Contemplated by Pickett Act—But aside from these considerations we find that the Act calls for work leading to a "discovery," which necessarily means such a discovery as will

support a location, and will justify a patent. *Congress could not have had in mind a discovery on any other tract than the one to be excepted from the withdrawal.*

The word "discovery," when used in connection with the mineral land laws, has a technical and well defined meaning, and Congress must be presumed to have known that meaning, and to have intended that it should be given to that word as used in that Act.

When mineral rights are asserted to a particular tract they must be *based upon a discovery within that tract* itself. There can be no such thing as a "discovery," in the sense in which that word is used in the mineral land laws, until mineral has been actually found within the claim in connection with which it is used.

Sec. 2320 R. S. U. S.;

Lindley on Mines, 337;

Gwillim vs. *Donneland,* 115 U. S. 45, 50, 29 Law. Ed. 348;

Larkin vs. *Upton,* 144 U. S. 19, 23, 36 Law. Ed. 330.

It has been further said, in support of this proposition, that—

> "The discovery of valuable mineral deposits outside of the claim; or deductions from established geological facts relating to it; one or

all of which matters may reasonably give rise to a hope or belief, however strong it may be, that a valuable mineral exists within the claim will neither suffice as a discovery thereon, nor be entitled to be accepted as the equivalent thereof."

East Tintic Consolidated Mining Company, 40 L.D. 272, 273.

Even if the discovery of oil on the southwest quarter strongly suggested the existence of oil in the other quarters, it cannot be said that the drilling of a well on the former tract was work leading to the discovery of oil on the latter tract, notwithstanding the fact that it might have induced the drilling of a well thereon, because,

"To constitute a discovery the law requires something more than conjecture, hope or even indications. The geological formation of the country may be such as scientific research and practical experience have shown to be likely to yield oil in paying quantities. Taken with this there may be other surface indications, such as seepage of oil. All these things combined may be sufficient to justify the expectation and hope that, by driving a well to sufficient depth, oil may be discovered, but one and all they do not of and in themselves amount to a discovery." *Miller* vs. *Chrisman, supra.*

See also

Nevada Sierra Oil Co. vs. *Home Oil Co.,* 98 Fed. 673;

Weed vs. *Snook,* 144 Cal. 439.

The Theory of Group Development Cannot Be Applied Under the Pickett Act

It cannot be successfully contended that the drilling on the N½ of the SW¼ was tantamount to work leading to a discovery of oil on the tracts in dispute in these cases under the statutory rule which recognizes that the doing, after discovery, of what is usually called "annual assessment work" and "patent work or expenditures" on one of a group of contiguous mining claims held in common ownership under valid locations will protect the rights of the claimant to all the claims embraced in the group.

In considering this question it will be helpful to keep clearly in mind the object and purposes of the Acts of Congress requiring the different kinds of work to be performed; the kinds and character of work required, and the purposes for which it must be performed.

Section 2324 R. R. U. S. provides that—

> "On each claim located after the tenth day of November, Eighteen Hundred and Seventy-two, and until patent has been issued therefor, not less than one hundred dollars' worth of labor shall be performed or improvements made during each year. * * * But where such claims are held in common, such expenditure may be made upon any one claim; and upon a failure to comply with these conditions, the claim or mine upon which such failure shall occur, shall be open to revocation in the same manner as if no location had ever been made, provided that the original locators, their heirs,

assigns or legal representatives, have not resumed work upon the claim after failure and before such location."

Section 2325 R. S. U. S. says that a mineral claimant shall be entitled to a patent to a "claim or claims" upon showing, among other things, "that five hundred dollars' worth of labor has been expended or improvements made upon the claim by himself or grantors;" and the Pickett Act says that the rights of *bona fide* occupants or claimants shall not be impaired if they are, at the date of the withdrawal, "in diligent prosecution of work leading to discovery" so long as they "shall continue in diligent prosecution of such work."

The purposes of the requirements of Sections 2324 and 2325 were "to require every person who asserted an exclusive right to his discovery or claim to expend something of labor or value as an evidence of his good faith, and to show that he was not acting on the principle of the dog in the manger." (*Chambers et al.* vs. *Harrington,* 111 U. S. 350.)

The claimant's failure to meet the requirements of those sections did not work a forfeiture on his claim to the Government, as did the failure of one claiming under the Pickett Act. It only left him subject to lose if an intervenor claimed the land, as required by law, when claimant's assessment work had not been done, as required, after discovery.

The sections mentioned (other than the Pickett Act) relate to claimants who held under valid locations supported by actual discoveries—locations, the recorded notices of which imparted knowledge to all the world that the land was claimed; and such claimants are not required to remain continuously in possession, or to continuously perform the required labor; while a claimant under the Pickett Act and the cases cited must rely alone upon his open, and notorious adverse possession, and his *continuous and diligent prosecution of work* leading to a discovery to furnish that notice. It cannot be said that Congress had in mind the requirements of these sections when it passed the Pickett Act, or that it intended that "work looking to discovery" should be the same or even kindred to the labor and improvements required of persons holding under valid locations—*i. e.,* those accompanied by a discovery. The Courts have declared that the "assessment work" required by the decisions and by Section 2324 is not the kind of "work" required by that Act. *McLemore* vs. *Express Oil Co., supra.*

But if it be admitted that Congress did have those sections in mind, and did intend that the "work" required by that Act should correspond with the "labor" and "improvements" required by the existing law we find in that fact a strong reason for contending that "work" on one of a group of claims would not except the others from the withdrawal, because that Act does not so specify, as do other laws. In Section 2324 there is an express legislative

declaration that "where such claims are held in common such expenditures may be made upon any one claim," without which there could be no such thing as "group development," and the Pickett Act *does not contain such a declaration.*

Group Development Defined—There is an essential element in "group development" which is not found in this case. Mr. Lindley correctly and plainly states this element when he says that:

> "The burden or proof is on the owner to show that the work done or improvements made (after discovery) do, as a matter of fact, tend to the development of the property as a whole, and that such work is a part of a general scheme of improvement." *Lindley on Mines,* 630.

It is well established that the group development specifically sanctioned by Sec. 2324 R. S. U. S. must be such work as will result in such development as *will facilitate the ultimate extraction or production of mineral* from each and every claim within the group, and not such work as will merely tend to, or do no more than indicate the existence of mineral in all the claims. The theory of group development has relation to the extraction of minerals, and not to the original discovery of minerals, which is prerequisite to a valid location, and it relates to claims by a person who has already made a discovery on each claim of the group, and who, therefore, already has a vested right to each claim.

That there must be a valid discovery on each tract before the theory of group development can

be invoked is clearly deducible from the decision of the Supreme Court of California in *Smith* vs. *Union Oil Co.,* 135 Pac. 966, 969.

In that case it was urged that the drilling of a well on an adjoining tract and within a thousand feet of the land in dispute was such work as entitled the claimant to invoke the Act of February 12, 1903 (32 Stat. 825), commonly known as the Five Section Act, and the Court answered that that act "cannot be construed to include or refer to work done upon a claim to accomplish a discovery thereon in order to perfect the location."

Group Development Before Discovery Not Sanctioned by Statute—The theory of group development can be invoked in this case only on the assumption that Congress intended that work on one tract leading to a discovery there should be accepted as work leading to a discovery on each of the other tracts of the group of which it formed a part.

The words used in the Pickett Act do not justify that assumption, and such an intent is negatived by it.

It is an original and fundamental provision of law that the area of a placer mining location is limited to twenty acres, and that annual assessment work amounting to $100.00 and a patent expenditure of $500.00 must be made *on each claim* of that area.

The only departures which have been made from these requirements have been *made in express words by statutory enactment.* The association of two or not more than eight twenty-acre claims in one location by two or not more than eight persons *is specifically authorized;* the privilege of performing, after discovery, assessment work on one of a group of claims *is expressly authorized* by Section 2324 R. S.; the privilege of claiming credit for the cost of tunnels outside of the claims is *the result of express enactment* (18 Stat. 315), and the privilege of doing assessment work on any one of five contiguous oil claims after discovery to the credit of the entire group was *expressly given* by the Act of Congress of February 3, 1903 (32 Stat. 825).

In no case has a departure from the original requirements been made by mere implication, and there is nothing in the Pickett Act which shows even an implied intent on the part of Congress to sanction "work" on one of a group in lieu of work on each claim of that group for the purpose of making discovery.

Economic Development—The fact that a prudent man who owned four adjoining quarters would ordinarily not drill on more than one tract at a time, or that he could more economically explore and develop the whole group in that manner does not meet the demands of the situation in this case. He cannot in that way acquire title to what the Government owns.

In furtherance of the theory that development work on one of a group of tracts covered by a valid location must be such as will develop all the tracts of the group, the courts and the Land Department have said that the several tracts must be contiguous.

Notwithstanding this well established rule, group development of non-contiguous tracts was contended for in *Gird* vs. *California Oil Co.,* 60 Fed. 531, 537, on the ground, among others, "that the stratification of the district in question is so irregular that to work profitably and judiciously it is necessary to develop the territory by successive wells, as expressed by some of the witnesses, 'to feel our way along,' " a plan and a contention close akin to the method pursued by the appellants in this case.

In answer to that contention, the Court in that case, in holding that there must be work on each individual claim, said:

> "All this, no doubt, greatly conduces to the profits of the plaintiff's lessees, and is very convenient. But I am unable to see that these facts at all answer the requirement of the law regarding the location and acquisition of placer mining ground, which is the same, whether the mineral it contains be gold, silver, quicksilver, petroleum, or anything else."

Lack of Available Water Did Not Excuse Failure to Drill

The appellants have urged an inability to secure sufficient water as an excuse for their failure to drill for oil on the tracts in dispute until 1911, but this

fact does not excuse their laches or entitle them to the benefits of the Pickett Act.

It has not been shown that McLeod and the Mays Oil Company had any reasonable grounds to expect that they could obtain a sufficient amount of water for simultaneous drilling on each of the four quarters of the section, or that any unforeseeable or unexpected occurrence prevented them from obtaining it. Even that proof would not avail them anything.

The lands were located in an extremely arid country, where water was very scarce, and McLeod, at the date he purchased the locations, and the Mays Oil Company, at the date of its lease, must have known these facts; and knowing them, accepted and assumed all the risks incident to the undertaking, and could not be excused from timely complying with the law which at that time called for diligent work, for drilling, even to protect their claims from relocation by mere trespassers. It will not do to say that their actual possession was enough because the law, both then and now, required diligent and continuous prosecution of work leading to discovery.

The contention that a lack of water excused diligent work was fully answered by Judge Bean in his decision in the case of *United States* vs. *Midway Northern Oil Company, supra.*

The pleadings and facts there involved are so closely akin to those in the present case, and Judge

Bean in his decision so fully and concisely states the law applicable to them as to justify the following quotations from it. He says, in part, as follows:

> "It is urged, however, that they had in good faith signified an intention by filing and recording notices and doing so-called assessment work, to enter the lands under the mineral laws, and that they would have proceeded with work looking to discovery but for their inability to obtain water for use in their boilers and for drilling purposes. The lands in controversy are situate in an arid section of the State, and until late in 1909 or early in 1910 it was difficult if not impracticable to obtain water in sufficient quantities for successful drilling, but I do not think that fact brings the cases within the terms of law.
>
> "There is no intention manifest in the statute, as far as I can see, to protect or confer any rights on those who had merely made a filing prior to the Withdrawal Order, but who were unable to engage in work looking to discovery, but only those who were at the date of the order *bona fide* occupants or claimants of the lands withdrawn and *actually engaged in the diligent prosecution of such work.* None of the defendants comes within this category."
>
> * * * * *
>
> "Now, the mere effort, however diligent, to obtain water for drilling purposes, or the inability to do so, which is all the evidence for the defendants tends to show, cannot be held to constitute diligent prosecution of work looking to discovery any more than the pursuit of capital to prosecute such work, or a lumber pile or unused derrick can be held to constitute such diligence. The question is not whether the defendants were able to prosecute the work of

> discovery at the date of the Withdrawal Order, but whether they were actually engaged in such work at that time."

The doctrine that one seeking title to public lands assumes all the risks incident to the acquisition of title, and cannot excuse his failure to comply with the law by urging even insuperable obstacles which he knew or should have known when he initiated his right, has long been applied by the Land Department in the administration of the public land laws.

The Act of June 14, 1878 (20 Stat. 113) authorized the patenting of non-timbered public lands to one who grew timber thereon, and as long ago as 1881 it was held that one who for that purpose entered lands in an arid region did so at his own risk, and could not plead arid conditions or lack of water in extenuation of his failure to meet the law's requirements, and this rule has been consistently followed since that date.

Chapman vs. *Zweck,* 1 L. D. 123;

Andrews vs. *Young,* 19 L. D. 493;

Reynolds vs. *Ramsdell,* 23 L. D. 312.

The doctrine has also been applied under other classes of entries.

Equitable Title by Prescription

Although no attempt was made by appellants in their assignments of error to present the question on appeal, it was contended for them in argument in the trial Court that the Consolidated Mutual Oil Company had acquired such an equitable title, through its possession and the possession of its grantors, to the lands in dispute as, under Sec. 2332 R. S., will support a patent, and that, therefore, a receiver should not have been appointed.

It is here suggested and urged on behalf of appellee that this question is not properly before this Court on these appeals, and should not be presented in argument for the reason that it is not either expressly, or even by implication, raised in the assignments of error. Nothing has been said in the assignments of error which in any manner *apprises the opposite counsel or the Court that this particular legal point would be relied upon for a reversal of the trial Court,* such as this Court declared to be necessary in its decision in *Doe* vs. *Waterloo,* 70 Fed. 455, 461, quoted above, and for that reason it is urged that, under Rule 11 of this Court, counsel should not be heard on this question, except at the request of the Court; and the question would not be discussed in this brief were it not for the assumption that counsel for appellant will again present it in brief and arguments not yet served on counsel for appellee at the date on which this is written.

Section 2332, R. S., upon which this contention is based, reads as follows:

> "When such person or association, they and their grantors, have held and worked their claims for a period equal to the time prescribed by the statute of limitations for the mining claims of the state or territories where the same may be situated, evidence of such possession and working of the claims for such period shall be sufficient to establish a right to a patent thereto under this chapter in absence of any adverse claim."

This statute does not support the contention made: (1) Because neither this statute, even if it be treated as a statute of limitations, or any other general statute of limitations, applies to the Government; (2) because the appellant did not and could not hold these lands adverse to the Government; and (3) because the statute requires a discovery and compliance with the requirements of the law, and no discovery was made on these lands until long after the lands were withdrawn.

STATUTES OF LIMITATION DO NOT APPLY TO THE GOVERNMENT—The doctrine that statutes of limitation do not apply to the Federal Government is too well known to justify extended consideration.

Redfield vs. *Parks,* 132 U. S. 239.

That Section 2332 R. S. does not apply to the Government has been frequently declared.

Mr. Lindley, in his work on Mines (3d Ed.), in speaking of this statute, says at page 1717:

> "It would seem to recognize the doctrine that as against everyone save the United States, the title to a mining claim may be acquired by possession, use and enjoyment for a period equal to the time prescribed by the statute of limitations."

Judge Sawyer, in *Mining Co.* vs. *Bullion M. Co.,* 3 Saw. 634, 645, 11 Morr. Min. Rpts. 608, said that this statute gave a right "as against any person but the United States."

In *McTarnahan* vs. *Pike,* 91 Cal. 540, 543, a plea was set up in an action in ejectment that defendant and his grantors had been in possession of the placer mining ground in dispute for more than twenty years at the time the plaintiff made a placer mining entry therefor, and the Supreme Court of California, in denying that plea, said:

> "The statute of limitations did not run against the Government * * *. For the mere purpose of proving title by prescription defendants' alleged adverse possession before plaintiffs entered and paid for the land counted for nothing."

Possession of the Lands Could Not Be Adverse to the Government—It is well settled that one holding an inchoate right in public lands to which he is seeking title does not hold them adverse to the Government, and his rights are at all times subject to the right of the Government to withdraw or make other disposition of the lands.

In *Nessler* vs. *Bigelow,* 60 Cal. 98, 101, a claim of adverse possession for fifteen years was set up to defeat an action in ejectment in which plaintiff claimed under a patent issued less than five years before the commencement of the suit.

The Court said:

> "But they could not have held adversely to the Government and the action having been commenced within five years after the issuance of patent, the statute of limitations cannot avail them against the patentee."

See also:

Frisbie vs. *Whitney,* 9 Wall 187;
Rector vs. *Ashley,* 6 Wall 142;
Shiver vs. *United States,* 159 U. S. 491;
Union P. R. R. vs. *Harris,* 215 U. S. 386;
Roughton vs. *Knight,* 219 U. S. 537.

Section 2332 R. S. Requires Discovery and Work—The appellants cannot claim the benefit of Section 2332 R. S., even if they could otherwise do so, because they had not at that date been in possession for five years, and because they had not made a discovery at the date of the withdrawal, and were not then or thereafter for a long time doing the acts essential to the acquisition of title.

That act was passed simply to regulate the patent procedure, to relieve claimants of the necessity of making the formal proofs otherwise required, and not to relieve applicants from doing the other things

required by the mining laws. The regulations (Sec. 75, 34 L. D. 184) issued under that statute require the claimant to furnish with his application for patent "his sworn statement giving a clear and succinct narration of the facts as to the origin of his title, and likewise as to the continuation of his possession of the mining ground covered by his application; the area thereof; *the nature and extent of the mining that has been done thereon,*" etc.

In speaking of the acts of mining required, Mr. Lindley in his work on Mines says:

> "The acts of mining should not be merely occasional, fugitive and desultory, but as continuous as the nature of the business and customs of the country permit and require." (3d Ed., p. 1719.)

It was said in Barringer and Adams' Law of Mines, page 569:

> "To establish an adverse possession of a mining claim on the public domain, there must be an actual possession of a part, accompanied by a claim of the title to the whole, and continuous working thereon."

In *Upon* vs. *Santa Rita M. Co.,* 14 N. M. 96, 89 Pac. 275, 283, it was said that:

> "Section 2332 does not relieve parties from the obligation to do annual assessment work or compliance with any of the proposed requirements of law antecedent to patent imposed upon the holder of a valid location."

Did the Issuance of Final Certificate Deprive the Courts of Jurisdiction?

The appellants, as defendants below, plead in their answer that an application for patent, under which a final certificate had issued by the Register of the Land Office, had been presented to and is pending before the Land Department and supported that plea by an affidavit offered in evidence at the hearing under the motions for a receiver.

It was argued in briefs filed in the Court below: (1) That the final certificate deprived the Government of all interest in these lands, and for that reason appellee cannot ask the appointment of a receiver, and (2) that the pendency of patent proceedings before the Land Department deprived the Courts of jurisdiction to try the question of title.

Neither of these points is presented in the assignments of error, and it is now urged on behalf of appellee that they should not be either argued or considered on this appeal for the reasons heretofore suggested, unless it be that the last question, that as to jurisdiction, can be raised and considered under the general doctrine that a Court's jurisdiction can be questioned at any stage of a proceeding before it.

While the issuance of a final certificate, as a general rule vests an equitable estate in the entryman, it is not an indefeasible estate, and does not prevent

either the Land Department or the Courts from inquiring into its validity and effect.

Cornelius vs. *Kassel,* 128 U. S. 456, 461, 32 L. Ed. 482;

Orchard vs. *Alexander,* 157 U. S. 372, 382, 39 L. Ed. 737.

Johnson vs. *Towsly,* 13 Wall. 72, 85, 20 L. Ed. 485, 487.

Court Not Deprived of Jurisdiction by Patent Proceedings Pending Before Land Department—This question was lately presented to and decided by Judge Bean in *United States* vs. *Devil's Den Consolidated Oil Co.* and two other cases, in which the facts, the questions of law, and the contention of defendants were substantially the same as those here under consideration, and sufficient answer to the contention here made by appellants as to the jurisdiction of the trial Court was given by him in that decision, rendered October 4, 1916, and in view of the fact that it is unpublished and not easily accessible the following extended quotation is made from it.

After noting the fact that the charges attacking the validity of defendant's claims in those cases had been preferred under directions from the Commissioner of the General Land Office and were pending before the Local Land Office, Judge Bean said:

"Thereafter these suits were commenced, based upon substantially the same grounds as the

charges filed against the entries in the local Land Office. The defendants plead the pendency of the proceedings before the Land Office in bar, the contention being that the acceptance by the officers of the local Land Office of defendants' application for patent and the purchase price of the land was in effect a judgment *in rem* and vested the equitable title to the land in the defendants, subject only to the appellate jurisdiction of the Land Department, and until such judgment is annulled by the proper authorities within the Land Department, the defendants are entitled to the possession of the property, with the right to extract and dispose of the minerals thereof.

In a contest between private parties over the title or right to the possession of mining property for which patent has not been issued, the doctrine invoked would no doubt be applicable. Where the necessary steps are taken by a qualified applicant to obtain a patent to mining land and no adverse claim has been filed, the applicant becomes vested with the equitable title and a prima facie right to a patent immediately upon the payment of the purchase price, and the delay of the Department in issuing patent 'does not diminish the rights flowing from the purchase or cast any additional burdens on the purchaser or expose him to the assaults of third persons.' (*Benson M. Co.* vs. *Alta M. Company,* 145 U. S. 428; *El Paso Brick Co.* vs. *McKnight,* 233 U. S. 250.) But such a proceeding does not divest the Government of its title, nor is it an adjudication as between the claimant and the Government. In such a case there is no adjudication by the Land Department of any questions arising on the application for patent. Nor has it been allowed or approved by the Government or any of its officers, and no final certificate has been issued. But if the ap-

plication had been allowed and passed to patent it would not have been conclusive against the Government. (*Washington Securities Co.* vs. *U. S.,* 234 U. S. 76.) All that has been done in the instant cases is the receipt by the officers of the local Land Office of the application for patent and the purchase price, the transmission by them of the same to the General Land Office and a subsequent filing of objections to the issuance of patent by an agent of the Department. The broad question then is whether the mere acceptance by the Land Office of an application for a patent to a mining claim in due form from a private individual, and the payment by the latter of the purchase money after the required notice has been given, is a bar during the pendency thereof in the Land Department to a suit by the Government to cancel and annul the entry of the applicant, if any, and determine his right to possess and to extract and market the mineral, on the ground that the application for patent and the proceedings connected therewith were and are fraudulent, wrongful and unlawful.

In my judgment it is not. The proceedings are wholly *ex parte* as to the Government and can have no greater effect than if the patent had actually issued, and it is settled law that the issuance of a patent under such circumstances is not a bar to a suit by the Government to vacate or annul such patent if fraudulently and unlawfully obtained, or issued by mistake or inadvertence of the officers of the Land Office. (*Hughes* vs. *United States,* 4 Wallace 232; *Germain Iron Co.* vs. *United States,* 165 U. S. 379; *Washington Securities Co.* vs. *U. S.,* 234 U. S. 76; *Linn & Lane Timber Co.* vs. *U. S.,* 236 U. S. 574.) I do not think any greater virtue should be accorded to a mere *ex parte* preliminary proceeding. It is insisted, however, that as the applications for patent are now pending and

undetermined in the Land Department, the Court will not assume jurisdiction even if such applications are fraudulent and unlawful, until they are finally disposed of by the Department. The Land Department is vested, conformably to the Acts of Congress, with the exclusive jurisdiction to determine the rights of claimants to public lands, and until it has exhausted its jurisdiction by the issuance of a patent, a Court will not assume to determine which of two rival claimants is entitled to the property. (*Johnson* vs. *Towsley,* 13 Wall. 72; *Marquez* vs. *Frisbie,* 101 U. S. 473.) But the Government is not an adverse party to a proceeding to acquire title to its property, nor is the Land Department a tribunal to which it must submit its rights or litigate with one who has taken possession of its property or has attempted to acquire title thereto. The notice required by statute of an application for patent to a mining claim is designed and intended to cut off the rights of private claimants and not the Government of the United States. It is given in order that all persons having adverse claims may be heard in opposition to the issuance of the claim, and makes no issue on the statement of the claimant. When, therefore, he succeeds by misrepresentations, by fraudulent practices, aided by perjury, there would seem to be more reason why the United States, as the owner of the land of which it has been defrauded by these means, should have remedied against that fraud—all the remedy which the Courts can give—than in the case of a private owner of a few acres of land on whom a like fraud has been practiced.

I am of opinion, therefore, that the Court has jurisdiction to try the questions involved in these cases. If, however, I am mistaken as to the extent of the jurisdiction, the Government is clearly entitled upon the allegations of the bill and the showing made to invoke the aid of

a Court of Equity to protect the property from waste and destruction pending the final determination of its rights therein in the Land Department out of the Court." (*Northern Lumber Company* vs. *Ryan,* 124 Fed. 819; *El Dora Oil Company* vs. 229 *Federal* 246.)

Even where lands have ceased to be public lands by pre-emption, homestead and like claims but to which claimant has not perfected his title, they are still so far public lands of the United States that the Government may protect them from waste. (*Shiver* vs. *U. S.,* 159 U. S. 491.)

The Land Department has no general equitable power. It cannot grant injunctions, appoint receivers, nor, by its orders or decrees prevent trespass upon or protect the public domain from spoliation. It is true under the Act of Congress of August 25, 1914, the Secretary of the Interior is authorized in his discretion to enter into agreements with a certain class of applicants for patents for oil and gas lands included within an order of withdrawal, relative to the disposition of oil or gas produced therefrom. This is a discretionary power probably intended for the benefit and to protect from liability these; but (Sec. 2325) says:

"If no adverse claim shall have been filed it shall be presumed that no adverse claim exists, and thereafter, no objection from third persons to the issuance of patent shall be heard except it be determined that the applicant has failed to comply with the terms of this chapter." Sec. 2325 R. S.

If, however, an adverse claim is filed during the period of publication, the adverse claimant is required by Section 2326 to commence within 30 days thereafter proceedings in a Court of competent jurisdiction to determine the same, thus clearly showing that the purpose of the

statute is to make the proceedings binding on private parties and not the Government. There is no reason to be found in the relation of the Government to such a proceeding which will deprive it of the same right to relief if the proceedings are fraudulent or unlawful as an individual would have in regard to his own contract procured under similar circumstances. Indeed, there are reasons why it should not be denied the right to invoke the aid of a Court by the mere receipt and acceptance of an application for a patent and the purchase price by an officer of the local Land Office, for, as said by Mr. Justice Miller in *U. S.* vs. *Miner, supra:*

"In nine cases out of ten, perhaps in a much larger percentage, the proceedings are wholly *ex parte*. In the absence of any contesting claimant for a right to purchase or secure the land, the party applying has it all his own way. He makes his own purchase, sworn to before those officers, and he produces affidavits. If these affidavits meet the requirements of the law, the claimant succeeds, and what is required is so well known that it is generally reduced to a formula. It is not possible for the officers of the Government, except in a few rare instances to know anything of the truth or falsehood of these statements. In the cases where there is no contesting claimant there is no adversary proceeding whatever. The United States is passive; it opposes no resistance to the establishment of the trespassers, those who in the judgment of the Secretary have mistakenly trespassed upon land not open to entry and in good faith expended money in prospecting for oil and in the development and the improvement of the property. In one of the cases now under consideration an application for such a contract has been made and denied by the Secretary on the ground and for the reason that suit was then pending in this

> Court. His reasons for refusing to enter into the contract are not the subject of review here. It is enough that no such contract has been made."

It may be helpful in the consideration of this question, and supportive of Judge Bean's decision, to suggest that these are withdrawn lands, and are no longer "public lands" subject to disposal under the public land laws, and are for that reason not subject to the jurisdiction of the Land Department.

By Art. IV., Sec. 3 of the Constitution, the power of absolute control and disposal of the public domain is vested in the Congress, and such authority as the Land Department can exercise in relation to it comes through express delegation by Congress.

By Sec. 441 R. S.

> "the Secretary of the Interior is charged with the supervision of public business relating to the following subjects:
>
> * * * * * * *
>
> Second: The public lands, including mines."

Sec. 453 R. S. provides that

> "the Commissioner of the General Land Office shall perform, under the direction of the Secretary of the Interior, all executive duties appertaining to the surveying and sale of the public lands of the United States, or in anywise respecting such public lands, and, also, such as relate to private claims of land, and issuing patents for all land under the authority of the Government."

It will be observed that the authority here delegated by Congress relates only to "public domain" and "public lands" and these words have been repeatedly defined by the Supreme Court.

In *Baker* vs. *Harvey,* 181 U. S. 481, 490, it was said:

> "'Public domain' is equivalent to 'public lands' and these words have acquired a settled meaning in the legislation of this country. The words 'public lands' are habitually used in our legislation to describe such as are subject to sale or disposal under general laws. *Newhall* vs. *Sawyer,* 92 U. S. 161, 163; 23 L. Ed. 769. The grant is of alternate sections of public lands, and by 'public lands', as has been long settled, is meant such land as is open to sale or other disposition under general laws. *Bordon* vs. *N. P. R. Co.,* 145 U. S. 535, 538; *Mann* vs. *Tacoma Land Co.,* 153 U. S. 273, 284."

In *Baker* vs. *Harvey, supra,* the Court remarked:

> "It could not be well said that lands which were burdened with a right of permanent occupancy were a part of the public domain and subject to full disposal of the United States."

In *Newhall* vs. *Sanger, supra,* the Court held, as was said in syllabus:

> "Grants of land to aid in constructing works of internal improvement, do not embrace tracts reserved by competent authority, for any purpose or in any manner, although no exception of them were made in the grants themselves."

The discussion of this question will not here be extended further than to call attention to the following decisions:

Wilcox vs. *Jackson,* 13 Pet. 498, 10 L. Ed. 264;

Steel vs. *St. Louis S. & R. Co.,* 16 Otto 447, 27 L. Ed. 226, 228;

United States vs. *Carpenter,* 111 U. S. 347, 28 L. Ed. 451;

United States vs. *Des Moines N. & R. Co.,* 142 U. S. 510, 35 L. Ed. 1099.

Ancellary Relief

Even if it be held that the pendency of patent proceeding before the Land Department deprived the Courts of the power to hear and determine the principal issues joined in these cases, that fact does not prevent the Courts from taking such action by the appointment of a receiver, or otherwise as will protect the property and preserve its *status quo* until the questions of title and right of possession are determined by that department or otherwise.

Northern Lumber Co. vs. *Ryan,* 124 Fed. 819;

El Dora Oil Co. vs. *United States,* 229 Fed. 946;

United States vs. *Devils Den Oil Co., supra;*

Shiver vs. *United States,* 159 U. S. 491;

Hunt vs. *Stesse,* 75 Cal. 620.

In conclusion it is urged that upon the whole case it does not appear that there was any abuse of the discretion of the lower Court, and that, therefore, its action should not be reversed.

E. J. Justice,
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Jas. W. Witten,
Attorneys for the Appellee.